No. 10-1299

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPHINE S. MILLER,

Petitioner,

v.

PRAXAIR, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To establish constructive discharge under Title VII, is a plaintiff required to show that the employer had the intent to cause the plaintiff to resign?

PARTIES TO THE PROCEEDING

The Petitioner is Josephine S. Miller. The four Respondents are Praxair, Inc., John Day, David Chaifetz, and Dennis Reilley.

Petitioner was the plaintiff in the District Court, and Respondents were the defendants. In the Court of Appeals, Miller was the appellant and Respondents were the appellees.

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT PRAXAIR, INC.

Pursuant to Supreme Court Rule 29.6, Respondent Praxair, Inc. hereby states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. The other Respondents are individuals for whom there is no parent corporation or stock holdings.

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RULES:

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I. INTRODUCTION

This case does not merit the exercise of this Court's *certiorari* jurisdiction because the issue presented for review here was not dispositive and never even raised by Petitioner in the proceedings below. There was no need for either of the courts below to determine whether Petitioner had to prove that Respondents intentionally made her working conditions so intolerable that she would resign because they concluded that, as a matter of law, the conditions of Petitioner's employment were not intolerable, findings that Petitioner does not contest here. Nor is it clear that there even is a conflict between the Second Circuit and this Court's precedent regarding the sole issue Petitioner presents for review. Accordingly, the Petition should be denied.

In granting summary judgment, the district court (Droney, J.) held that Petitioner's claims failed "[b]ecause Miller has not presented evidence upon which a reasonable jury could find constructive discharge, an adverse employment action, or hostile work environment. . . ." Pet. App. 21a. As to constructive discharge, Judge Droney explained that "[o]f more consequence in this motion for summary judgment, however, is that Miller has not presented sufficient evidence that a reasonable person in her shoes would have felt compelled to resign." Pet. App. 24a. The issue of "intent" to cause her to resign thus was not the reason why her claims failed; that issue was not dispositive precisely because Petitioner failed even to show the predicate of intolerable working conditions.

The Second Circuit Court of Appeals, through Justices Amalya L. Kearse, Joseph M. McLaughlin, and Debra Ann Livingston, summarily affirmed (six days after oral argument) Judge Droney's carefully reasoned summary judgment ruling, finding that the facts viewed most favorably to Petitioner failed to establish "the sort of 'intolerable' working conditions necessary to a constructive discharge claim." Pet. App. 4a. Again, the question of "intent" was not an issue that the Court of Appeals ever had to reach and was never raised by Petitioner.

Not surprisingly, because Petitioner failed to show that her working conditions were "intolerable," whether Praxair allegedly "intended" to force her to resign by making her working conditions intolerable is simply beside the point. The principal case Petitioner relies upon here, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) ("*Suders*"), cited so often in the Petition that in its Table of Authorities those references are listed as "*Passim*" (Pet. viii), was not cited at all in Petitioner's opening and reply briefs to the Second Circuit. Indeed, it was cited only once in her opposition to summary judgment in the District Court – *not* for the proposition advanced here, but instead in support of the very proposition upon which both lower courts approved summary judgment: "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Joint Appendix, Vol. II-60. In Petitioner's case, both the United States District Court for the District of

Connecticut and the Second Circuit Court of Appeals answered that question in the negative.

Accordingly, even if there were a Circuit split or deviation from this Court's decision in *Suders*, and even if this Court were to rule that intent is not part of the constructive discharge equation, the outcome below would not change at all as a result of such a ruling. These circumstances alone make this case distinctly not worthy of the exercise of *certiorari* jurisdiction. Moreover, it is not even demonstrated that the Second Circuit adheres to any supposed pre-*Suders* "intent" test because, in the post-*Suders* cases Petitioner cites, as well as those she does not, the Second Circuit has not had to reach the "intent" issue to adjudicate a constructive discharge claim; as here, in those cases, the plaintiffs failed to show that their working conditions even met the "intolerable" threshold. Thus, there is no post-*Suders* Second Circuit decision that considers whether the pre-*Suders* law in that Circuit must change. The presumption should be that the Second Circuit follows this Court's decisions, especially when, as here, the ruling appealed from does not state otherwise.

Petitioner's question presented, therefore, is no more than a request for an advisory opinion concerning a legal question that was not presented below, is irrelevant to the disposition of this case, and is not worthy of this Court's jurisdiction. Even if resolved in Petitioner's favor, it would change nothing. For these reasons, the Petition should be denied.

II. STATEMENT

This Petition arises from a multi-count lawsuit brought by one of Respondent Praxair, Inc.'s former in-house attorneys, Josephine Miller, the Petitioner. The facts are set forth in the District Court's ruling granting summary judgment (Pet. App. 10a-19a), and Respondents incorporate those facts by reference here.

As an initial matter, Petitioner's Statement of the Case misstates the basis upon which summary judgment was granted and affirmed. Contrary to Petitioner's assertions, the absence of "intent" to create conditions so intolerable that Petitioner would be forced to resign demonstrably was not the basis for granting and affirming summary judgment. In its discussion of Petitioner's constructive discharge claim, the District Court concluded that Petitioner had failed to show that her working conditions were so intolerable that a reasonable person in her shoes would have felt compelled to resign. Pet. App. 24a. That finding, fatal to any constructive discharge case, is unchallenged here.

In addition, the District Court found that Petitioner suffered no adverse employment action:

> Setting aside her allegation of constructive discharge, Miller alleges none of the prototypical examples of adverse employment actions, such as termination, demotion, decrease in salary, change of job title, loss of benefits, or reduced responsibilities.

> Additionally, none of the incidents Miller forwards can be considered, as a matter of law, adverse employment actions.

Pet. App. 25a. These findings, too, obviate any need to address the "intent" issue Petitioner attempts to have this Court consider.

Finally, the District Court concluded that Petitioner did not suffer from a hostile work environment:

> Here, Miller has failed to establish a genuine issue of material fact as to whether the conduct was so severe or pervasive that a reasonable person would find the environment abusive.

Pet. App. 28a. The District Court concluded:

> In summary, while there may have been animus between Miller and one or more Praxair employees that caused Miller's working at Praxair to be unpleasant, she has not presented a genuine issue of material fact as to constructive discharge, an adverse employment action, or hostile work environment, which are essential to her claims.

Pet. App. 31a.

Thus, the District Court had no need to decide whether Petitioner's working conditions were somehow "created" with the "intent" that she resign, because the working conditions were not so intolerable as to cause a reasonable person to resign, were not the product of an adverse employment

action, and did not constitute a hostile work environment. *Id.* Intent, therefore, was and remains beside the point.

Likewise, in its non-precedential decision, the Second Circuit summarily affirmed the District Court's findings that the working conditions as a matter of law were not intolerable, that there were no adverse employment actions, and that there was no hostile work environment. Pet. App. 4a-6a. Just as it was unnecessary for the District Court to address *Suders*, "intent," or any purported Circuit conflict, the issue presented here for review was not briefed by the parties or decided on appeal in the Second Circuit.

III. REASONS FOR DENYING THE PETITION

A. The Issue Presented Was Not Considered Below

"This Court usually will decline to consider questions presented in a Petition for Certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988). "[W]e do not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Suders, the linchpin case in the Petition, was cited but once below by Petitioner – not for the proposition that she seeks to advance here, but for the non-controversial requirement that before an employee

can claim constructive discharge, she must show that her working conditions were "intolerable." The case was not cited by either Petitioner or Respondents in their appellate briefs. The purported "split in the Circuits" trumpeted in the Petition was not raised by the Petitioner or addressed at any level. Whether *Suders* eliminated an "intent" requirement played no role in the analysis. By advancing the "intent" issue here, Petitioner is attempting to inject an issue into this case, at the final stage of judicial review, which was not considered or addressed below.

B. Even If *Suders* Eliminated An "Intent" Requirement, The Outcome Of This Case Would Not Change

The single ground upon which Petitioner seeks review is the question of whether "intent" to create intolerable working conditions so as to force an employee to resign is or is not an element of a constructive discharge claim under federal law. However, that is not an issue that this Court ever would reach here because Petitioner does not contest the predicate finding that her working conditions were not intolerable. Stated another way, if the working conditions are not intolerable, it does not matter whether they were created with the intent that the employee resign, so the issue is a red herring designed to distract from the absence of a legal wrong. Certainly, this Court's role is to decide questions of great importance, but it does not do so "abstractly." *The*

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). Here, the issue raised in the Petition was not necessary for the resolutions below, and therefore resolution of the supposed Circuit conflict or the need to address any alleged deviation from *Suders* is irrelevant to the outcome of this case. The dispositive ground upon which the lower courts granted and affirmed summary judgment, the absence of intolerable working conditions, is not contested.

Thus, in order to reach the issue presented for review here, the Court would have to forgive Petitioner for not raising it below and overlook that the courts below did not have to address it because the predicate element of intolerable working conditions was not satisfied. This case is hardly the appropriate vehicle for review when the outcome of this Court's decision, whichever way it goes, will change nothing about the ultimate outcome.

C. The Second Circuit's Post-*Suders* Decisions Cited By Petitioner, As Well As Those Not Cited, Further Illustrate Why *Certiorari* Should Be Denied

Petitioner cites several post-*Suders* Second Circuit decisions to illustrate the supposed split, as well as the Second Circuit's purported continued adherence to a pre-*Suders* "intent" requirement. Pet. 15. However, upon closer examination of these decisions, they, like the ones at bar, never reached the

"intent" issue. Instead, just like the case at bar, they affirmed judgments for the employer when, as here, the plaintiff could not show that the working conditions met the predicate requirement of intolerability. In fact, it is not even clear whether the Second Circuit would follow Petitioner's interpretation of *Suders* or not, because the cases she cites never had to address the very matter.

Thus, in *Nugent v. Saint Luke's-Roosevelt Hosp. Ctr.*, 303 F. App'x 943, 945 (2d Cir. 2008), the court affirmed the employer's summary judgment on the plaintiff's constructive discharge claim, expressly discounting the need to address the issue of intent:

> However, the District Court's decision did not require a showing of *mens rea*. The District Court considered Nugent's evidence – the reprimands, written warnings, and suspension she received, and the psychological harm she claims she suffered as a result – and concluded that it was insufficient to support a finding that a reasonable person in her situation would have felt compelled to resign. Accordingly, even if she is correct that the Supreme Court [in *Suders*] has removed the intent element of the constructive discharge standard, Nugent introduced insufficient evidence to survive summary judgment.

In *Theilig v. United Tech. Corp.*, No. 10-1417, 2011 U.S. App. LEXIS 6074, at *6-7 (2d Cir. March

24, 2011), the court again did not reach the intent issue because it did not have to do so:

> Theilig argues on appeal, as he did below, that there was no evidence of "intolerable working conditions," because he was no longer at work. Theilig therefore argues in essence that the purported failure to accommodate is tantamount to constructive discharge. Theilig's concession that there were no intolerable working conditions, however, is fatal to his claim under the law of this Circuit.

The final post-*Suders* Second Circuit case cited in the Petition, *Morris v. Schroder Capital Mgmt. Int'l*, 481 F.3d 86, 88 (2d Cir. 2007), similarly never reached the intent issue:

> Even assuming the truth of Morris's factual allegations and giving him the benefit of all reasonable inferences, he has failed to plead that the working conditions at his former place of employment were "so difficult or unpleasant that a reasonable person in [his] shoes would have felt compelled to resign." [Citation omitted].

In addition to these decisions, there are two post-*Suders* Second Circuit decisions Petitioner omits from her lengthy brief. The first, *Holowecki v. Federal Express Corp.*, 382 F. App'x 42 (2d Cir. 2010), quoted verbatim and applied the *Suders* test: "To establish

constructive discharge, a plaintiff 'must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.'" *Id.* at 46. The court there, as here, concluded that the plaintiff "was unable to point to evidence of intolerable working conditions. . . ." *Id.*

The second case not mentioned in Petitioner's brief, *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004), cited *Suders*, which had just been announced, and also applied its holding. See *id.* at 225 ("'a supervisor's official act precipitates the constructive discharge'") and 230 ("'The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?'"). The *Petrosino* court reviewed the evidence and, while concluding that there was no deliberate attempt to force the plaintiff's resignation, it ultimately rejected her predicate claim that working conditions were intolerable: "In any event, Petrosino has not demonstrated that quitting was the only way out. . . ." *Id.* at 231. The court emphasized, "[b]ut where an employee has within her power the means to eliminate the added condition that purportedly renders her employment intolerable and fails to pursue that option, she cannot demonstrate that she was compelled to resign." *Id.* at 231-32.

Accordingly, at least in the Second Circuit, in each of the cases citing *Suders*, the courts have correctly described its holding, quoting from this Court's

IV. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

May 24, 2011

Respectfully submitted,

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